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No. 05-1603

IN THE

Supreme Court of the United States

G. K. LTD. TRAVEL, ET AL.,

Petitioners,

v.

CITY OF LAKE OSWEGO, OREGON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR INTERNATIONAL SIGN ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE NINTH CIRCUIT'S REFUSAL TO APPLY *FREEDMAN* ABSENT A PUBLIC FORUM OR CONTENT NEUTRAL REGULATION IMPROPERLY EXTENDS *THOMAS*. 3

A. The Background of *Freedman* and *Thomas* 4

B. The Extension of *Thomas* in *G.K.* 6

C. The *G.K.* Ordinance Is Not Content Neutral 8

D. There Is No Showing That The Sign Code Contains Objective Standards 12

II. THE USE OF SIGN CODE TO DEPRIVE BUSINESSES OF COMMERCIAL VIABILITY, THUS COMPELLING TRANSFER TO HIGHER-VALUE ENTERPRISES, DEROGATES FROM DUE PROCESS OF LAW 14

A. Due Process 14

B. Public Use 16

III. THE CITY'S CUSTOM AND USAGE FAVORED THE REPLACEMENT OF EXISTING LAKE GROVE DISTRICT BUSINESSES WITH AN UPSCALE "TOWN CENTER" 17

CONCLUSION 20

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).....3

Adderly v. Florida, 385 U.S. 39 (1966).....6

Agins v. City of Tiburon, 447 U.S. 255 (1980).....15

Albright v. Oliver, 510 U.S. 266 (1994).....14

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996).....3, 15

Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976).....3

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).....3

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985).....19

Berman v. Parker, 348 U.S. 26 (1954).....16

Burk v. Augusta-Richmond County, 365 F.3d 1247 (11th Cir. 2004).....7

City of Lake Oswego v. Lake Grove Garden Center and Darryl Eddy, Nos. 04-CI-61302 – 04-CI-63386, 04-CI-63389, 05-CI-63391, 05-CI-63392 (Lake Oswego Mun. Ct. June 1, 2005).....9

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).....12

Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)...16

Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301 (11th Cir. 2003) 7

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 5

Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. 1998) 10

Freedman v. Maryland, 380 U.S. 51 (1965) ..... *passim*

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 4, 8

G.K. Ltd. Travel v. City of Oswego, 436 F.3d 1064 (9th Cir. 2006) ..... *passim*

G.K. Ltd. Travel v. City of Oswego, 2004 WL 817142 (D. Or. 2004) 10, 18

Graham v. Connor, 490 U.S. 386 (1989) 14

Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2003) 8

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) 16

Kelo v. City of New London, 125 S.Ct. 2655 (2005) 16

Kevin Gray –East Coast Auto Body v. Village of Nyack, 566 N.Y.S.2d 795 (App. Div. 1991) 11

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) 3, 15

Madsen v. Women's Health Center, 512 U.S. 753 (1994) 8

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 19

Pearsall v. Richmond Redevelopment and Housing Auth., 242 S.E.2d 228 (Va. 1978) 17

Ray's Stateline Market, Inc. v. Town of Pelham, 665 A.2d 1068 (N.H. 1995) 11

Santa Monica Food Not Bombs v. City of Santa Monica, __ F.3d ___, 2006 WL 1666707 (9th Cir. June 16, 2006) 7

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989) 14

Southern Oregon Barter Fair v. Jackson County, 372 F.3d 1128 (9th Cir. 2004), *cert. denied*, 126 S.Ct. 367 (2005) 6, 7

Thomas v. Chicago Park District, 534 U.S. 316 (2002) *passim*

Topanga Press, Inc. v. City of Los Angeles, 409 F.Supp.2d 1188 (C.D. Cal. 2005) 7

United States v. Grace, 461 U.S. 171 (1983) 6

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 8

STATUTES

42 U.S.C. § 1983 19

OTHER AUTHORITIES

Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) 17

Transcript, City of Lake Oswego v. Lake Grove Garden Center and Darryl G. Eddy, No. 04-CI-61302 (Municipal Ct. of City of Lake Oswego), Testimony of Robert Arthur Galante, May 27, 2005 ..... 13, 19, 20

Memorandum from Johnson Gardner, Economic Conditions Analysis for the Lake Grove Town Center Plan, Lake Oswego, Oregon (Sept. 30, 2002) at 4, *available at* www.ci.oswego.or.us/.../LGTC%20Report/Technical%20Appendix/Part%201%20LGTC%20Plan%20Technical%20Appendix.pdf 2, 19

Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004 17

Lee van der Voo, *Lake Grove Plan Creates Concern: Some Business Owners Worry About What The Plan May, May Not, Include*, LAKE OSWEGO REVIEW, July 6, 2006 18

INTEREST OF THE AMICI[1]

The International Sign Association (ISA) is a 1,900 member organization composed of manufacturers, users, and suppliers of on-premise signs and sign products produced by more than 400,000 employees in all 50 states and 69 foreign countries. ISA exists to support, promote, and improve the $30 billion-a-year sign industry, which sustains the nation's nearly $3 trillion-a-year retail industry. As such, the ISA and its members have a vital interest in the preservation of constitutional rights to free expression and private property.

SUMMARY OF ARGUMENT

In *Freedman v. Maryland*,[2] this Court protected freedom of speech by requiring that restraints on expression prior to judicial review be brief, that the regulator expeditiously seek judicial review, and that the regulator bears the burden of proving the restraint's justification. More recently, in *Thomas v. Chicago Park District*,[3] the Court held that all of the procedural safeguards of *Freedman* were not necessary where government sought to coordinate uses of its own public forum through content-neutral regulations. Even then, however, authorities could not possess unbridled discretion, nor could they stifle free expression.

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

[2] 380 U.S. 51 (1965).

[3] 534 U.S. 316 (2002).

The Ninth Circuit's opinion in *G.K Travel v. City of Lake Oswego* (*G.K.*)[4] represents a significant expansion of this Court's *Thomas* exception to *Freedman*, since it applies *Thomas* to private premises that are not public fora. *G.K.* also illustrates the dangers to free expression that this expansion poses. While the City's sign code purports to be content-neutral, its design and implementation support the City's intent to hasten the conversion of the Lake Grove district from laid-back, traditional to one contemplating a high-density upscale "town center."

The City discerns redevelopment opportunity from strong retail demand and an aging stock of buildings. However, "many of the local businesses are thriving and the remaining economic life of existing improvements will preclude widespread redevelopment."[5]

Prohibitions against the substitution of the name of a new business owner for a predecessor, together with a lack of standards and delay in the review of sign permit applications, has reduced the viability of existing businesses and, as a practical matter, may compel sales of land to more strongly financed "town center" developers.

In addition to violating the petitioners' First and Fifth Amendment Rights, such conduct is arbitrary and capricious and violates petitioners' rights under the Fifth and Fourteenth Amendment Due Process Clauses. Until this Court's decision

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[4] Pet. App. A; 436 F.3d 1064 (9th Cir. 2006), *pet. for cert.* filed June 13, 2006 (NO. 05-1603).

[5] Memorandum from Johnson Gardner, Economic Conditions Analysis for the Lake Grove Town Center Plan, Lake Oswego, Oregon (Sept. 30, 2002) at 4, *available at* www.ci.oswego.or.us/.../LGTC%20Report/Technical%20Appendix/Part%201%20LGTC%20Plan%20Technical%20Appendix.pdf

last year in *Lingle v. Chevron U.S.A., Inc.*,[6] however, Ninth Circuit precedent precluded petitioners from asserting substantive due process claims.[7]

There are two reasons why certiorari should be granted in this case, the judgment vacated, and matter remanded for further proceedings. First, the Ninth Circuit's unwarranted extension of the scope of the *Thomas* exception wrongfully absolved the respondents of the burden of proof that would be theirs under the *Freedman* standard. Second, the Ninth Circuit's erroneous interpretation of the Due Process Clause deprived petitioners of an opportunity to raise substantive due process claims.

ARGUMENT

I. THE NINTH CIRCUIT'S REFUSAL TO APPLY *FREEDMAN* ABSENT A PUBLIC FORUM OR CONTENT NEUTRAL REGULATION IMPROPERLY EXTENDS *THOMAS*.

As this Court has noted, "[t]he text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct."[8] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[9]

The Ninth Circuit earlier recognized that "[c]ommunication by signs and posters is virtually pure speech."[10] Signs contain expressive content as well as a

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[6] 544 U.S. 528 (2005).

[7] Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc).

[8] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996).

[9] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[10] Baldwin v. Redwood City, 540 F.2d 1360, 1366 (9th Cir. 1976).

physical presence. In *Freedman v. Maryland*,[11] this Court established procedural safeguards against the arbitrary exercise of discretion of prior restraint of speech and the lack of procedures protecting against the exercise of prior restraint.[12]

A. The Background of *Freedman* and *Thomas*.

The defendant in *Freedman* had been convicted of exhibiting a film not submitted to the State Board of Censors. This Court overturned that conviction, holding that prior restraint on the exhibition of a motion picture was constitutional only if

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.[13]

In *Thomas v. Chicago Park District*,[14] this Court deemed *Freedman*'s procedural safeguards "inapposite," because the regulation at issue was "not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."[15] Nevertheless, *Thomas* noted that the park ordinance contained a detailed list of reasons for permit

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[11] 380 U.S. 51 (1965).

[12] *Id.* at 58-60.

[13] FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990) (principal opinion of O'Connor, J., joined by Stevens and Kennedy, JJ.) (citing *Freedman*, 380 U.S. at 58-60).

[14] 534 U.S. 316 (2002).

[15] *Id.* at 322.

denial,[16] that denial could occur only for one of the listed reasons, that applications must be processed within 28 days, and that reasons for denial had to be clearly explained.[17] "These grounds are reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'"[18] Furthermore, permit denials could be appealed to the park district administrator and the courts.[19]

The regulatory scheme challenged in *Thomas* required "a person to obtain a permit in order to 'conduct a public assembly, parade, picnic, or other event involving more than fifty individuals,'" or using amplified sound.[20] As Justice Scalia explained for the Court:

> The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system ... is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities .... and to assure financial accountability for damage cause by the event."[21]

Thus, the restriction in *Thomas* allows the Park District, the owner of the land maintained by it as a public forum, to allocate and protect the use of its valuable resource. Those

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[16] *Id.* at 319 n.1

[17] *Id.* at 324.

[18] *Id.* (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992)).

[19] *Id.*

[20] *Id.* at 318.

[21] *Id.* at 321.

who obtain permits for family reunions, soccer games and political events are transients. They do not own the resource and have little individual incentive to protect it. As this Court has declared with reference to displays in its own building, "[t]he Government, 'no less than a private owner of property, has the power to preserve the property under its control.'"[22]

B. The Extension of *Thomas* in *G.K.*

In *G.K.*, the Ninth Circuit applied *Thomas* instead of providing the procedural safeguards of *Freedman*.

While *Thomas* stressed the need for coordination of uses of a government public forum, and the need to maintain and protect that forum,[23] those factors do not apply to on-site sign regulation. The person with the long-term interest in protecting the sign and the business that it enhances is not the regulator, but the landowner subject to regulation. The municipality imposes restrictions primarily for the benefit of the voters, whose cultural preferences and financial well-being command the solicitude of local officials. The possibility that officials may impair the free expression and property rights of minorities are what the First and Fifth Amendments are designed to protect against. Therefore the Ninth Circuit erred in *G.K.* by applying the *Thomas* exception.

The Ninth Circuit first expanded the *Thomas* exception in *Southern Oregon Barter Fair v. Jackson County*,[24] where it held *Freedman* inapplicable in a case adjudicating the Oregon Mass Gathering Act.

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[22] United States v. Grace, 461 U.S. 171, 178 (1983) (quoting Adderly v. Florida, 385 U.S. 39, 47 (1966)).

[23] 534 U.S. at 322-23.

[24] 372 F.3d 1128 (9th Cir.2004), *cert. denied*, 126 S.Ct. 367 (2005).

> The Act applies to all mass gatherings irrespective of the purpose for the gathering. ... [T]he Act does not single out any particular activity or speech for regulation. It authorizes the Department of Human Services to promulgate regulations with respect to water supply, fire p.otection, and similar health and safety issues attendant on overnight gatherings of large crowds. *None of these health and safety issues has anything to do with censoring the content of the applicant's speech.*[25]

Last month, in *Santa Monica Food Not Bombs v. City of Santa Monica*,[26] the Ninth Circuit similarly upheld a requirement that "distributors of free food must comply with '[a]pplicable State health and safety standards regulating food service and distribution.'" The court noted that restrictions on food distribution, lying on public sidewalks, and the like, "are not forms of conduct integral to, or commonly associated with, expression."[27] It concluded, citing *Barter Fair*, that "[w]hether food distribution can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge, should one be brought."[28]

Other courts have distinguished *Thomas* as being applicable to all activities in parks, not communicative activity as such.[29]

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[25] *Id.* at 1137 (emphasis added).

[26] ___ F.3d ____, 2006 WL 1666707 (9th Cir. June 16, 2006).

[27] *Id.* at 2006 WL 1666707 *7.

[28] *Id.* (*citing* Barter Fair, 372 F.3d at 1135).

[29] Burk v. Augusta-Richmond County, 365 F.3d 1247, 1254-55 (11th Cir. 2004). *See also*, Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301 (11th Cir. 2003) (restrictions on adult entertainment); Topanga

In *G.K.*, substantial information and evidence in related litigation reveals that the City's purpose in imposing ostensibly content-neutral bans on pole signs and subjective regulations on other signs in the Lake Grove district included inducing the departure of businesses from the traditionally eclectic area and replacing them with an upscale "Town Center" development.[30]

C. The *G.K.* Ordinance Is Not Content Neutral.

Just as *G.K.* fails to comport with the "public forum" prong of *Thomas*, it fails to comport with the "content neutral" prong as well. As this Court noted in *Ward v. Rock Against Racism*:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[31]

Press, Inc. v. City of Los Angeles, 409 F.Supp.2d 1188 (C.D. Cal. 2005) ("Nothing in *Thomas* undermines FW/PBS 's [FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990)] applicability to this case, which does not involve a public forum."). *Cf.* Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, 348 F.3d 1278, 1282 n.3 (11th Cir. 2003) (following *Thomas* where examination limited to whether sign related to on-site or off-site activity).

[30] *See Part III, infra.*

[31] 491 U.S. 781, 791 (1989). *See also*, Madsen v. Women's Health Center, 512 U.S. 753, 763 (1994) ("We ... look to the government's purpose as the threshold consideration.")

Thomas itself warned:

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.[32]

Nowhere in its opinion does the Ninth Circuit demand substantial studies supporting the need for, and attempts to tailor, the sign ordinance beyond general claims of aesthetic values. In this it is similar to a case in the local court, where another Lake Grove district merchant was convicted of maintaining a nonconforming pole sign after the May 21, 2004 termination date for all such signs. The trial judge rejected the defense that the ordinance was unconstitutional, stating that "it is not the appropriate position of this court to probe for the 'real purpose' of the City Council when the purpose is clearly stated [in the sign code]."[33]

The Lake Oswego ordinance, as it existed before nonconforming pole signs were prohibited, provided that "[a] non-conforming sign ... may be maintained or undergo a change of copy without complying with the requirements of this chapter, with the exception that any change for a new business ... will comply ...."[34] There was no aesthetic reason

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[32] *Thomas*, 534 U.S. at 323 (internal references omitted).

[33] App. A at 3, *City of Lake Oswego v. Lake Grove Garden Center and Darryl Eddy*, Nos. 04-CI-61302 – 04-CI-63386, 04-CI-63389, 05-CI-63391, 05-CI-63392 (Lake Oswego Mun. Ct. June 1, 2005).

[34] Pet. App. A at 3, n.2; 436 F.3d at 1068 n.2.

why a change in business name should be singled out for unfavorable treatment. Furthermore, amortization of a sign pertains to the recovery of the tangible and intangible investment in the sign, which is not inherently a function of the sign's current ownership. In this respect, the sale of a nonconforming sign should fare no differently than the sale of a nonconforming business or other nonconforming property, where the existing use continues under the new owner.

The Ninth Circuit declared that *Foti v. City of Menlo Park*[35] stood for the proposition that whether a sign regulation is content-based depends on "'whether the ordinance singles out certain speech for differential treatment based on *the* idea expressed.'"[36] "City officials have to read signs only to determine whether the text of the sign or a logo on the sign has changed .... As the city notes, even those who speak no English could perform this superficial review function."[37] From that observation, the Ninth Circuit concluded that the regulation was not content based.[38]

Likewise, the trial court declared that the *Foti* test "does not make sense when the applicable government regulation is not based on a sign's message but is, instead, based on a sign's appearance or change in its appearance. As such, the fact that a law enforcement officer has to examine a sign to determine its legality is not always dispositive."[39]

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[35] 146 F.3d 629 (9th Cir. 1998)

[36] Pet. App. A at 24; 436 F.3d at 1078 (quoting *Foti*, 146 F.3d at 636 n.7) (emphasis added).

[37] *Id.*; 436 F.3d at 1079.

[38] *Id.*

[39] Pet. App. B at 10; 2004 WL 817142 at *5.

However, it is not as simple as that. A sign, or sign restriction, may express more than one idea. Restrictions on changes of content may be restrictions on content. A code that permits a faded sign to be repainted with fresh and highly visible lettering indicates a proclivity to preservation. A sign painted in the same manner as before, but with the substituted name of a new proprietor of a business, indicates to the community that a business is under new management. It does not take a very literate sign examiner to observe that Lake Oswego had a preference for the old and disdain for the transfer and revitalization of businesses. Businesses often advertise themselves "under new management" because that information resonates with the public. If the City's intent is to reduce the adaptability of existing small businesses, prohibitions on sign alterations proclaiming new ownership, and stringent restrictions on changes of any sort, are good ways to achieve that substantive goal.

In another case involving a transfer of business ownership and an ordinance prohibiting the alteration of the text of nonconforming signs, *Kevin Gray-East Coast Auto Body v. Village of Nyack*,[40] the New York appellate court held that the plaintiff had established a prima facie case that the zoning ordinance violated his First Amendment right of free speech. "Generally, absent a showing that the *predominant purpose* of an ordinance is not to control the content of the message . . ., such truthful commercial speech may not be prohibited on the basis of its content alone."[41]

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[40] 566 N.Y.S.2d 795 (App. Div. 1991). *Accord*, Ray's Stateline Market, Inc. v. Town of Pelham, 665 A.2d 1068, 1070 (N.H. 1995).

[41] *Id.* at 796 (emphasis added).

D. There Is No Showing That The Sign Code Contains Objective Standards.

While time, place, and manner regulation is not subject to strict scrutiny, but rather "comparatively softer intermediate scrutiny"[42] such regulation must have *some* boundaries. Hence the requirement in *Thomas* that they "contain adequate standards to guide the official's decision and render it subject to effective judicial review."[43]

Notably, the Ninth Circuit opinion does not require studies, empirical data, or other objective referents for the City's sign code. Illustrating its deferential approach, it justifies the City's exception from permit requirements and fees of certain institutions, such as hospitals and railroads, on the grounds that the exceptions constitute preferences for certain speakers and "say nothing of the City's preference for the content of these speakers' messages."[44] In fact, there is an inextricable connection between what the institutions are and what they say.

The Ninth Circuit explains: "With respect to the Code's permitting process ... there is admittedly an element of subjectivity to the determination of 'compatibility.'"[45] However, the following dialogue at a City Council meeting reviewing possible amendments to sign regulations indicates another possible City motivation:

> Council President Rohde spoke to removing the subjective review section from the sign code. He said that business people have told him that they needed a

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[42] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002).

[43] *Thomas*, 534 U.S. at 323 (internal references omitted).

[44] Pet. App. A at 20-21; 436 F.3d at 1077.

[45] Pet. App. A at 38; 436 F.3d at 1085.

> sign code with a basic criteria [sic] to which they could adhere. He stated that they found this subjective review clause requiring signs compatible with other nearby signs, elements of street, site furniture, and adjacent structures to be one of the biggest problems with the code. ...
>
> Mr. [Tom] Coffee [Assistant City Manager and Planning Director] discussed the difficulty of legislating aesthetics and design. He pointed out that, even with specific standards, someone would come in with something that met the standards but still did not look right. He argued that, *without the subjective review clause, staff had no ability to turn down any sign that ostensibly met the standard.* He mentioned the tension between aesthetic quality and certainty.[46]

In recent testimony in another case involving sign regulation in the Lake Grove district, the City's Redevelopment Director, and former senior planner, stated that "[t]here's a compatibility review section of the Sign Code, which outlines the aesthetic issues and concerns that should be addressed for a sign." He then was asked: "Did the city staff come up with an objective formula for applying that design review clause?" His response: "There is no objective review possible for a subjective standard."[47]

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[46] Pet. App. L at 23, City Council Study Session Minutes, September 14, 1999, "Results of 1998 Sign Inventory and Review of Possible Amendments to Sign Regulations (emphasis added).

[47] App. B at 2, Transcript, City of Lake Oswego v. Lake Grove Garden Center and Darryl G. Eddy, No. 04-CI-61302 (Municipal Ct. of City of Lake Oswego), Testimony of Robert Arthur Galante, May 27, 2005.

II. THE USE OF SIGN CODES TO DEPRIVE BUSINESSES OF COMMERCIAL VIABILITY, THUS COMPELLING TRANSFER TO HIGHER-VALUE ENTERPRISES, DEROGATES FROM DUE PROCESS OF LAW.

A. Due Process.

Through the time of the district court's decision in *G.K.*, the settled Ninth Circuit rule was that petitioners had no cause of action under the Fifth and Fourteenth Amendment Due Process Clauses. In 2005, however, this Court clarified the viability of due process claims.

In *Graham v. Connor*,[48] this Court held that a claim for physical injuries, asserted to result from excessive force in a police investigatory stop, should be analyzed under the Fourth Amendment's "objective reasonableness" standard, instead of under the substantive due process standard. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"[49]

In *Sinaloa Lake Owners Ass'n v. City of Simi Valley*[50] a Ninth Circuit panel held that *Graham* does not bar a companion substantive due process claim where "the government has used its power in an abusive, irrational or

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[48] 490 U.S. 386 (1989).

[49] Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting *Graham*, 490 U.S. at 395).

[50] 882 F.2d 1398, 1408-09 n.10 (9th Cir. 1989).

malicious way." In *Armendariz v. Penman*,[51] the Ninth Circuit rejected this approach *en banc*. It declared that "*Sinaloa*'s somewhat off-hand dismissal of *Graham* was wholly inconsistent" with judicial self-restraint.[52]

However, in *Lingle v. Chevron U.S.A., Inc.*,[53] this Court made clear, in the course of clarifying its takings jurisprudence, that due process claims were not subsumed within the Takings Clause:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such [a due process] inquiry is *logically prior to and distinct from* the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.[54]

The petitioners averred in their First Amended Complaint that "[t]he First Amendment to the United States Constitution protects plaintiffs and others from arbitrary and discriminatory enforcement of vague standards.[55] While concepts of vague and arbitrary rules and conduct permeate the proceedings, the petitioners should have an opportunity to

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[51] 75 F.3d 1311 (9th Cir. 1996) (en banc).

[52] *Id.* at 1326.

[53] 544 U.S. 528 (2005).

[54] 125 S.Ct. at 2084 (discussing Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980) (stating that a regulation constitutes a taking if it "does not substantially advance legitimate state interests")) (emphasis added).

[55] Pet. App. F at 30 (Petitioner's First Amended Complaint, ¶ 115).

raise these issues in an appropriate Fifth Amendment, Fourteenth Amendment, and Civil Rights Act[56] context.

B. Public Use.

While petitioners did not press their takings claims in the Ninth Circuit,[57] shortly before the oral argument this Court interpreted the Fifth Amendment's Public Use so as to provide more stringent procedural protections for landowners than in its prior cases.[58] Writing for the Court in *Kelo v. City of New London*, Justice Stevens held that condemnation for retransfer for economic development is a permissible public use, but recognized that such transfers of property, "executed outside the confines of an integrated development plan ... would certainly raise a suspicion that a private purpose was afoot."[59]

Justice Kennedy was even more emphatic: "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose."[60] Notably, he cited this Court's precedent[61] often identified

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[56] 42 U.S.C. § 1983.

[57] Pet. App. A at 7 n.5; 436 F.3d at 1064 n.5.

[58] *See* Berman v. Parker, 348 U.S. 26, 33 (1954); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

[59] 125 S.Ct. 2655, 2667 (2005).

[60] *Id.* at 2669 (Kennedy, J., concurring).

[61] *Id.* (citing Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)).

with probing review sometimes termed rational basis "with bite."[62]

As a broader picture of the goals of the respondents emerges, the *G.K.* petitioners may have meritorious claims that the Public Use Clause was violated through signage regulations depriving traditional business of commercial viability and thus, in effect, compelling sales to upscale developers. The growing importance of condemnation for retransfer for private economic development,[63] coupled with municipal actions that would reduce the value of parcels intended by the locality for other purposes,[64] makes particularly timely that the petitioners have an opportunity to raise this issue on remand.

III. THE CITY'S CUSTOM AND USAGE FAVORED THE REPLACEMENT OF EXISTING LAKE GROVE DISTRICT BUSINESSES WITH AN UPSCALE "TOWN CENTER".

The Ninth Circuit rejected the petitioners' assertion that the Sign Code's review clause was so subjective as to allow officials to manipulate it to censor expression.

> Plaintiffs are unable to identify a single case of actual censorship of content by the permitting authority. ... Sometimes, as plaintiffs identify, the dialogue with the

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[62] Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972).

[63] *See, e.g.*, Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004, at B1. ("Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers.")

[64] *See, e.g.*, Pearsall v. Richmond Redevelopment and Housing Auth., 242 S.E.2d 228, 229 (Va. 1978) (discussing "condemnation blight").

> City breeds resentment or frustration ... Nonetheless, frustration of those who are regulated by the Sign Code is not sufficient evidence that the regulators are granted unbridled discretion.[65]

Others, however, are less certain that the Sign Code is administered fairly. The City's mayor spoke of "major dissatisfaction in the community with respect to the sign code," and suggested that 67 pole signs continue to be grandfathered.[66]

The lack of information and citizen input in the planning process has resulted in considerable community dissatisfaction. "Through petitions, members of the commercial association gathered more than 2,300 signatures from patrons at 60 Lake Grove businesses this spring in an effort to force the economic impact study."[67]

Much of this feeling of ill-treatment has become apparent only since the district court proceedings. Also, the subtlety of abuses of discretion and feeling that one "can't fight city hall" arise as well. Finally, a change of counsel at trial may have affected petitioners' ability to uncover specific abuses, as well.[68]

A locality that deprives an individual of federally protected rights "under color of any statute, ordinance,

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[65] Pet. App. A at 35-36; 436 F.3d at 1084.

[66] Pet. App. L at 27, City Council Minutes, May 2, 2000.

[67] Lee van der Voo, Lake Grove Plan Creates Concern: Some Business Owners Worry About What the Plan May, May Not, Include, *Lake Oswego Review*, July 6, 2006.

[68] Pet. App. B at 1; G.K. Ltd. Travel v. City of Oswego, 2004 WL 817142 *1 (D. Or. 2004) (not published in F.Supp.2d).

regulation, custom, or usage of any State" is civilly liable under federal law.[69]

A report submitted the City's marketing and development consultants, shortly after *G.K.* was filed in federal court, noted that the

> demand for retail space along [a main corridor in the Lake Grove district] is fairly strong, and the aging existing stock presents an opportunity for redevelopment. *However, many of the local businesses are thriving and the remaining economic life of existing improvements will preclude widespread redevelopment in the Town Center area.*[70]

In his testimony last year in another case pertaining to the City's sign code, the Director of the Lake Oswego Redevelopment Agency, Robert Galante, was asked if it is "generally the City's desire … to encourage a change of commercial uses or change in the character of the Lake Grove district?" He responded "Yes."[71] Mr. Galante added that the City had begun a study "to look at creating a more village downtown character for the Lake Grove area."[72] Furthermore,

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[69] 42 U.S.C. § 1983. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). *See also*, Bennett v. City of Slidell, 728 F.2d 762, 767 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985) ("We view custom to be one form which policy takes and by which it is proven, and we use 'policy' to include the pattern of conduct in actual practice that may be called 'custom.'")

[70] Memorandum from Johnson Gardner, Economic Conditions Analysis for the Lake Grove Town Center Plan, Lake Oswego, Oregon (Sept. 30, 2002) at 4 (emphasis added), *available at* www.ci.oswego.or.us/.../LGTC%20Report/Technical%20Appendix/Part%201%20LGTC%20Plan%20Technical%20Appendix.pdf.

[71] App. B. at 2-3.

[72] *Id.*

signs at lower levels, so that they're more visible to pedestrians and less oriented to motorists, "can often be one of the tools that's used to create that character."[73]

CONCLUSION

The Ninth Circuit's extension of this Court's *Thomas* exception to the *Freedman* rule is overbroad and should be limited. That limitation could take the form of restricting it to regulation of public fora, or, at the least, to restrictions of private property affecting conduct clearly not impinging upon speech, such as public health and protection from fire and similar hazards.

Given that the Ninth Circuit's position in *Armendariz v. Penman* precluded claims sounding in substantive due process, petitioners should have the opportunity to be heard on such claims.

Amicus Curiae International Sign Association respectfully urges this Court to grant the petition for a writ of certiorari in this case, to vacate the judgment below, and to remand for further proceedings not inconsistent with its opinion.

Respectfully submitted,

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[73] *Id.*

APPENDIX A

This is a certified true copy of the original held by
the Lake Oswego Municipal Court as it appeared on 6-27-06
By /s/ Fran Beake Keeper of the Records

June 1,2005
MUNICIPAL COURT

Mr. Douglas M. Bragg
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PO Box 369
Lake Oswego, OR 97034

Re: City of Lake Oswego v. Lake Grove Garden Center and
Darryl Eddy

Gentlemen:

The defendants are charged with multiple counts of
maintaining a pole sign in the City of Lake Oswego after the

mandated date for compliance of May 21,2004. The defendants have made certain stipulations of fact which, in conjunction with the evidence in this case, proves that the sign was in place after the amortization date of May 21, 2004, and that the pole sign was not legitimized via designation as an icon nor via a vision clearance allowance. The defendants' claim is that the sign code ordinance is unconstitutional as applied to their particular circumstances.

The sign code ordinance was enacted by the Lake Oswego City Council in 1985. It was revised in the early 1990's in response to constitutional issues and it's intent and purpose revisited by the legislative counsel. Amortization periods for pole signs as well as other matters were revisited in the years 2000 and 2003

The sign code ordinance's purpose, in general terms, appears aimed at the collective good. Focusing on the visibility of signs, the aesthetics and clutter created by unregulated sign practices, it appears that the ultimate intent was to improve the appearance of the City to the betterment of not only it's residents but also it's businesses. I found Mr. Paulsen's testimony helpful and credible. His testimony focused on the two issues of traffic safety and sign effectiveness for business purposes. While certainly not the defendants' burden of production) I was struck by the fact that I did not hear any evidence of a substantial increase in traffic accidents or other problems in those areas where the sign code has been implemented and monument signs have replaced pre-existing pole signs. Further, I fully accept Mr. Paulsen's testimony that signs are a significant advertising source and therefore, ultimately, a significant source of revenue for local businesses. What is missing from his testimony is the theory that the City would be so aesthetically improved by the implementation of the sign code that additional shoppers would frequent the area. This would provide an increased flow of traffic in front of the defendants' business which

would, again in theory, generate immediate new customers who would take the opportunity to shop at his store. It would also generate what I call potential customers in the form of those persons who pass by the Lake Grove Garden Center, notice it's location and remembered it for future reference.

The issues of traffic safety and commercial sign effectiveness are certainly important considerations. I believe the purposes designated by the City Council in their deliberations to be equally, if not more so. Regardless, it is not the appropriate position of this court to probe for the "real purpose" of the City Council when the purpose is clearly stated. I was struck by the fact that the sign code application was founded in the comprehensive plan and that there was substantial public input to both the comprehensive plan and the Council's deliberations on the sign code ordinance. The Council's purpose is as stated and will not be revisited by this court.

This case presents the classic situation of government regulating for what they deem to be the collective good with resulting impacts on local business owners in the form of loss of freedom (I can't have my sign exactly the way I want it) and significant outlays of money to conform with the ordinance in question. Having listened to the evidence and the argument of counsel and having reviewed the extensive pleadings in this case, I find that the sign code ordinance as applied to the defendants in this case represents a substantial government interest, the regulation applied to the defendants is content neutral and that the ordinance leaves open alternative channels for the content of the defendants' speech to overcome claims of unconstitutionality as applied to the defendants. I further find a sufficient rational basis for the burden placed upon the defendants expressive activity by the sign code ordinance [sic] Certainly the exact location of the defendants' speech as well as the physical area in which he is entitled to speak may be diminished. However, I do not find

that the regulations as applied to the defendant in this particular case are of such a degree to declare this matter unconstitutional as applied to the defendants. I make this finding with full awareness of the problems created for the defendants in complying with the ordinance. However, I believe the same burdens apply to other business owners as well.

Accordingly, I find the defendants guilty in cases 04-CI-61302 through 04-CI-63386. I am dismissing 04-CI-63389, 05-CI-63391 and 05-CI-63392 in the interests of justice.

I request that all parties coordinate a date and time for sentencing with the court clerk.

Very truly yours,

Wm. Bruce Shepley
Municipal Court Judge

WBS/jkb
cc: Fran Blake, Court Clerk

APPENDIX B

IN THE MUNICIPAL COURT OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO,	)	
	)	
Plaintiff,	)	No. 04-CI-61302,
	)	et cetera
v.	)	
	)	
LAKE GROVE GARDEN CENTER	)	
And DARRYL G. EDDY,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED THAT the above-entitled Court and cause came on regularly for hearing before THE HONORABLE WILLIAM SHEPLEY on Tuesday, the 31st day of May, 2005, at the Lake Oswego Municipal Court, Lake Oswego, Oregon.

APPEARANCES BY:

TIMOTHY J. SERCOMBE
DAVID POWELL
Attorneys at Law
on behalf of the Plaintiff;

JOHN F. WINSTON
DOUGLAS M. BRAGG
Attorneys at Law
on behalf of the Defendants.

(excerpt from page 30)

MR. GALANTE: Specific to pole signs different from other signs I don't recall anything.
Q Okay. So, with regards to all signs generally, then, were there other aesthetic concerns that the city staff had?
A There's a compatibility review section of the Sign Code, which outlines the aesthetic issues and concerns that should be addressed for a sign.
Q Did the city staff come up with an objective formula for applying that design review clause?
A There is no objective review possible for a subjective standard.

(excerpt from pages 52-53)

Q Okay. And is it generally the City's desire, as reflected in actions of the City Council over the last 12 years, to encourage a change of commercial uses or change in the character of the Lake Grove district?
A Can you ask that again, please?
Q Was it, as reflected in City Council decisions over the past 12 years -- has there been a desire by the Council to affect the character of the Lake Grove area?
A Yes.
Q And what's been that change or desire?
A Well, some number of years ago -- and I'm not very specific on this because I don't manage the planning -- haven't managed the planning department during that time so I haven't been specifically a part of it -- but they did pursue Main Street program, which would create a more village character along Boones Ferry Road. And they did also fairly recently, even within the last few years, begin a study to look at creating a more village downtown character for the Lake Grove area.

Q And part of the desire to create a village character, does that involve having the signs at a lower level so that they're more visible to pedestrians and less oriented to motorists?
A That can often be one of the tools that's used to create that character.